No. 75-1867

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

NELSON E. "BUCK" SANFORD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. D, *infra,* pp. 17A–27A) is not reported. The first opinion of the court of appeals (App. C, *infra,* pp 11A–16A) is reported at 503 F. 2d 291. The order of this Court remanding for reconsideration is reported at 421 U.S. 996. The opinion of the court of appeals on remand (App. A, *infra,* pp. 1A–7A) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 9A) was entered on May 27, 1976. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes an appeal by the United States from a pretrial order, otherwise appealable under 18 U.S.C. 3731, because the order was entered after a mistrial had been declared because of the inability of the jury to reach a verdict at an earlier trial of the same charges.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

STATEMENT

1. On November 2, 1972, a federal grand jury in the District of Montana returned a seven-count indictment charging respondents [1] and several co-defendants with

[1] Nelson "Buck" Sanford and his three sons, Rodney, Lon, and Rick.

offenses arising out of the killing of two elk on the Crow Indian Reservation and a Rocky Mountain bighorn sheep in Yellowstone National Park.

The indictment alleged that on December 22, 1971, respondent Rodney Sanford placed a telephone call from Montana to Paul Bagalio at the latter's home in Vermont and offered his services as a guide for elk and bighorn sheep hunting in Montana. Rodney Sanford telephoned Bagalio again on December 29, 1971, to repeat the offer, and a hunt was arranged. On January 2, 1972, Bagalio informed Rodney Sanford that he might bring along Bruce Parker, whom he described as a "friend and business associate" (App. C. *infra,* p. 12A) Parker was in fact an undercover agent of the United States Bureau of Sport Fisheries and Wildlife.[2]

Bagalio and Parker arrived in Montana on January 4, 1972. On January 6, respondents Rodney, Lon, and Rick Sanford transported Agent Parker and Bagalio to Greybull, Wyoming, where they obtained lodging for the night. The next morning the party boarded a helicopter and flew to the Crow Indian Reservation in Montana, where Rodney and Lon Sanford guided Agent Parker and Bagalio on an elk hunt. On January 8, 1972, at the direction of Rodney Sanford, Parker shot and knocked down a bull elk inside the Crow Reservation. Rodney Sanford then actually killed the animal. Later that day Rick Sanford returned with the helicopter, and the party flew

[2] Parker's status as an agent was disclosed in the indictment. Bagalio, although not an agent, had been deputized.

back to Greybull with the cape[3] of the slain elk. Rodney, Lon, and Rick Sanford continued on to Bridger, Montana, with the elk cape. Further hunting was postponed because of inclement weather, and Agent Parker and Bagalio returned to Vermont on January 11, after Bagalio gave Rodney Sanford a $2,488 check for one elk and the helicopter rental.

Parker and Bagalio arrived in Montana on February 1, 1972, for another hunt. On February 2, Rodney Sanford, Bagalio, and Agent Parker traveled by truck and snowmobile to the Crow Reservation. Later that day, at the direction of Rodney Sanford, Bagalio shot and killed an elk. Rodney Sanford removed the cape from the carcass, and on February 3 he transported Bagalio, Parker, and the elk cape through Wyoming to Bridger, Montana.

On February 7, 1972, Rodney Sanford guided Agent Parker and Bagalio from Bridger, Montana, into Yellowstone National Park to hunt bighorn sheep. Inside the park Rodney Sanford pointed out a sheep, which Bagalio shot and killed. Rodney Sanford removed the cape, head, and horns from the animal.

The next day Bagalio paid Rodney Sanford $2,912 in cash for the hunts and then flew to Seattle, Washington, with the two elk capes and the cape and horns of the bighorn sheep. They were met at the airport by taxidermist Chris Klineburger of Jonas Brothers of Seattle, Inc., who took possession of the animal parts

[3] "Cape" is a term used by hunters to refer to the portion of an animal's skin that is used by taxidermists in mounting a trophy.

and told Bagalio and Parker that he would fix his records to conceal the fact that the game had been killed out of season.[4] On February 16, 1972, respondent Nelson Sanford shipped additional parts of the dead elk from Montana to the Seattle taxidermy firm.

2. Count One of the indictment charged respondents, the three Klineburgers, and Jonas Brothers of Seattle, Inc., with having conspired, in violation of 18 U.S.C. 371, to transport in interstate commerce parts of the two elk and bighorn sheep, which had been killed in violation of state and federal statutes.[5] Count Two charged that Lon and Rodney Sanford entered the Crow Reservation on January 8, 1972, for the purpose of hunting thereon without lawful authority or permission, in violation of 18 U.S.C. 1165, and that Nelson and Rick Sanford aided and abetted them, in violation of 18 U.S.C. 2. Count Three charged that Rodney Sanford committed a similar offense on February 2, 1972, and that Nelson,

[4] Bagalio and Parker previously had told Gene and Burt Klineburger of Jonas Brothers that they were going to Montana to hunt with respondents.

[5] Revised Codes of Montana 1947 Annotated, Section 26–307(3), provides in part: "It shall be unlawful and a misdemeanor for any person during the closed season on any species of game animal * * * to take, hunt, shoot, kill or capture any such game animal * * *."

16 U.S.C. 26 provides in part: "All hunting, or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals, when it is necessary to prevent them from destroying human life or inflicting an injury, is prohibited within the limits of said [Yellowstone] park * * * Any person found guilty of violating any of the provisions of this section * * * shall be deemed guilty of a misdemeanor * * *."

Rick, and Lon Sanford aided and abetted him. Count Four charged Rodney Sanford with having hunted the bighorn sheep in Yellowstone National Park on February 7, 1972, in violation of 16 U.S.C. 26. Count Five charged Rodney, Lon, and Rick Sanford with having transported parts of the first illegally killed elk from Lovell, Wyoming, to Bridger, Montana, on January 8, 1972, in violation of 18 U.S.C. 43. Count Six charged Rodney Sanford with having committed a similar offense on February 3, 1972, with regard to the second illegally slain elk. Count Seven charged Nelson Sanford with having shipped parts of the two unlawfully killed elk from Montana to Jonas Brothers in Seattle on February 16, 1972, in violation of 18 U.S.C. 43, and the three Sanford sons, the three Klineburgers, and Jonas Brothers with aiding and abetting this offense, in violation of 18 U.S.C. 2.

3. A jury trial commenced on February 5, 1973. At the close of the government's case the trial judge acquitted all of the defendants on Count Seven and the Klineburgers and Jonas Brothers, Inc., on Count One. When the jury was unable to reach a verdict on the remaining charges the trial judge declared a mistrial.

Four months later (on June 6, 1973), as the government was preparing to retry them, respondents filed a motion to dismiss the indictment. After hearing oral argument, the district court dismissed the indictment on June 18, 1973, and entered a written opinion (App. D, *infra*) on August 31, 1973, setting out in detail the

reasons for the dismissal. The court found that the federal government, properly exercising statutory authority, had consented to the shooting of the animals and to the entries onto the Crow Reservation.[6] This finding of governmental consent was based on the facts stated in the indictment, on the government's concession in its memorandum opposing dismissal that Agent Parker and Bagalio were "acting in undercover capacities during the entire investigation," and on the testimony at trial of Robert Freeman, the United States Game Management Agent for Montana, that Parker and Bagalio were "given authority by our Bureau to do what was necessary to complete the investigation * * *" (Tr. 93).[7] The court reasoned that, because the government had given consent to the activities of Parker and Bagalio, those two individuals had not committed any crimes. The court concluded that respondents did no more than facilitate the acts of Parker and Bagalio. Because the acts of the latter were not crimes, the acts of respondents could not, according to the district court, be crimes.

4. The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The court of appeals concluded that the Double Jeopardy Clause barred the government's appeal. The court rejected the government's argument that appeal was permissible

[6] The court found it unnecessary to reach the other grounds (including entrapment) advanced in respondents' motion to dismiss.

[7] "Tr." refers to the transcript of trial, which, by agreement of the parties, was not transmitted from the district court to the court of appeals.

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because respondents could, without violating the Double Jeopardy Clause, have been tried again following the mistrial. Instead, the court held that respondents had been "acquitted of all charges" and that "[e]ven though a mistrial alone does not constitute jeopardy, the action of the district judge was based upon evidence heard at the trial going to the general issue of guilt and his order dismissing the indictment amounted to a finding of not guilty as a matter of law" (App. C. *infra,* pp. 15A, 16A).

5. The United States filed a petition for a writ of certiorari, No. 74–948. Because questions concerning the government's right to appeal were then before the Court in three other cases, we asked the Court to dispose of the petition "as appropriate" in light of those cases.

After the Court rendered its decisions in *Serfass* v. *United States,* 420 U.S. 377; *United States* v. *Wilson,* 420 U.S. 332; and *United States* v. *Jenkins,* 420 U.S. 358, respondents filed a memorandum arguing that *Jenkins* controlled, and that the court of appeals lacked jurisdiction because respondents already had been tried once and a remand would require a second trial. We filed a memorandum contending that *Serfass* controlled because, once the mistrial had been declared, a second trial was plainly permissible, and further proceedings leading to that trial are "pretrial" proceedings. We also pointed out that respondents were not "in jeopardy" at the time the district court dismissed the indictment.

On June 2, 1975, this Court granted our petition, vacated the judgment of the court of appeals, and remanded the case "for further consideration in light of *Serfass* v. *United States,* 420 U.S. 377 (1975)." 421 U.S. 996.

6. On remand, the parties filed new briefs. Respondents did not contend that the court of appeals lacked jurisdiction. Nevertheless the court of appeals once more dismissed the appeal for want of jurisdiction. It wrote (App. A. *infra,* p. 3A) that *Serfass* "does not apply to the case now before us. Here [respondents] have undergone trial. There is no question but that jeopardy has attached. That being so, and since the proceedings in the district court have ended in [respondents'] favor and the consequences of a reversal in favor of the Government would be that [respondents] must be tried again, we conclude that they would, on retrial, be placed twice in jeopardy."

The court concluded (App. A, *infra,* pp. 6A–7A): "It is of no consequence that retrial on remand here would be necessitated not by alleged judicial intervention and error but by the fact that the jury on the first trial was unable to agree. We recognize that at that point, following mistrial, retrial would not have constituted double jeopardy * * * Without retrial the judicial process would be frustrated; the dispute would be at stalemate. Here, however, mistrial was followed by a judicial action terminating the trial in [respondents'] favor." This fact, in the court's view of the case, made *Jenkins* controlling.

REASONS FOR GRANTING THE PETITION

This is the second time the United States has sought review of this case in this Court. After the court of appeals initially dismissed for want of jurisdiction, this Court vacated the judgment and remanded for further consideration in light of *Serfass*. The Court selected that case alone from the *Serfass-Wilson-Jenkins* trilogy, even though respondents had argued that *Serfass* is irrelevant and that *Jenkins* supports them.

The court of appeals on remand again dismissed the appeal, concluding, notwithstanding the order of this Court, that *Serfass* is irrelevant. The court of appeals is wrong; its decision is unsupported by any of the policies of the Double Jeopardy Clause and conflicts with a decision of another court of appeals.

1. Following the mistrial that was manifestly necessary because of a hung jury, respondents could have been subjected to a second trial without violation of the Double Jeopardy Clause. The government's success on an appeal of the dismissal order would simply subject respondents to that trial. The court of appeals expressly conceded as much (App. A, *infra*, p. 6A). It follows from this that dismissal of the indictment following a mistrial is properly viewed as the equivalent, for double jeopardy purposes, of a pretrial dismissal. Under that view, *Serfass* controls this case, and the court of appeals erred in refusing, in the face of this Court's prior order, to recognize that fact.

a. The district court dismissed the indictment in the instant case prior to the retrial to which the government was entitled as a result of the jury's inability to reach a verdict. At the time the court dismissed the indictment, respondents were not in jeopardy, because the "District Court was without power to make any determination regarding [respondents'] guilt or innocence." *Serfass, supra,* 420 U.S. at 389. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391–392. The government therefore is entitled to appeal and, if it prevails on appeal, to try respondents, just as was the case in *Serfass.*

There is no reason to conclude that such a trial would offend the Double Jeopardy Clause, for the trial is justified by the jury's inability to agree at the first trial.[8] The government's victory on appeal would not create an opportunity to subject respondents to an otherwise prohibited second jeopardy, but simply would enable the government to proceed on the course from which it was diverted by the grant of respondents' pretrial motion to dismiss the indictment.

Once a new trial is authorized by the mistrial, no conceivable purpose is served by holding, as the court of appeals did, that any legal mistake after the first trial and before the second is immune from review.

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[8] *Illinois* v. *Somerville*, 410 U.S. 458, 463; *United States* v. *Jorn*, 400 U.S. 470, 480–482 (plurality opinion); *Logan* v. *United States*, 144 U.S. 263, 297–298; *United States* v. *Perez*, 9 Wheat. 579.

That makes no more sense than did the position, rejected in *Serfass*, that pretrial rulings based on the "general issue" are unreviewable. If retrial following the mistrial is permissible, how can an order dismissing the indictment, followed by an appellate decision that the order was incorrect, turn that *same* retrial into a violation of the Double Jeopardy Clause?

Because the first trial ended in a mistrial, there were no findings of fact from the first trial on which the court could rely in deciding to dismiss the indictment. The jury was unable to reach a verdict, so that there literally were no facts found, either in favor of the respondents or in favor of the government, by the authorized factfinder. The mistrial operated to set aside all of the proceedings at the first trial; consequently, for double jeopardy purposes, the government may act as though the first trial never happened. There was no "verdict" of any sort in respondents' favor.[9] The fact that respondents could constitutionally be retried as a consequence of the mistrial is conclusive in establishing that there is no constitutional bar to the appeal.

b. Even viewing the district court's action as a post-trial order, the government's appeal is permissible

[9] In its original dismissal of the government's appeal in this case, the court of appeals relied upon the fact that the trial court's order of dismissal was based on evidence adduced at the first trial, concluding that the dismissal thus amounted to an acquittal and was for that reason not appealable (App. C, *infra*, pp. 15A–16A). In ordering the dismissal from which we now seek review, the court of appeals quite properly abandoned any reliance upon such a rationale. See *Wilson*, *supra*, 420 U.S. at 348–351; *Serfass*, *supra*, 420 U.S. at 390–393.

under the principles enunciated in *Wilson*. That case held that the government could appeal a post-trial legal ruling, where the effect of prevailing on appeal would be to reinstate the verdict of the jury, even though the ruling was based on evidence adduced at a trial and going to the general issue.[10]

Although, unlike *Wilson*, a decision for the government on the merits of its appeal in this case would not reinstate a verdict of guilty, it would return the government and the accused to the position in which they were before the district court's erroneous legal decision. After being returned to that position, the case would proceed to the trial, which is permissible after a mistrial.

C. The court of appeals thought that its decision was supported by *Jenkins*. It is not. *Jenkins* involved a verdict of acquittal entered at the end of trial by the factfinder. That did not happen here; the factfinder returned no verdict. The judge simply dismissed the indictment several months after the trial had terminated in a mistrial without a verdict for either the prosecution or the defense.[11]

[10] *Wilson* stressed that a reinstatement of a verdict of guilty would not require a new trial. In this case a new trial would be required, and the court of appeals concluded that this fact alone required it to dismiss the appeal. But the government's right to retry respondents was established by the declaration of the mistrial. As *Serfass* held, the fact that the government's success on appeal will be followed by a trial does not preclude an appeal, if the post-appeal trial is not itself a prohibited second jeopardy.

[11] At the conclusion of its opinion, and by way of preface to its reliance upon footnote 7 in *Jenkins*, the court stated (App. A, *infra*, p. 7A): "Here, however, mistrial was followed by a judicial

2. The court of appeals' refusal to entertain the government's post-mistrial appeal from the dismissal of the indictment in this case conflicts with the decision of the Sixth Circuit in *United States* v. *Wilson*, No. 75–1944, decided April 22, 1976. In that case, following a mistrial, the district court had granted the defendant's motion to dismiss the indictment on the ground that a second trial would be barred by double jeopardy. The United States appealed and the Sixth Circuit, after determining in light of *United States* v. *Dinitz*, No. 74–928, decided March 8, 1976, that the district court had erred, reversed and remanded for trial. While the court did not separately address the question of its jurisdiction to entertain the appeal, it analyzed the case in terms of the only inquiry that we believe is proper (and that the court below rejected)—whether the second trial was independently barred by the Double Jeopardy Clause. This conflict as to the appealability of post-mistrial dismissals should be resolved by this Court.[12]

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action terminating the trial in appellees' favor." We are somewhat at a loss to understand what the court had in mind by its use of the phrase "terminating the trial," since there was no trial in progress at the time the indictment was dismissed. Unquestionably, the first trial had "terminated" when the mistrial was declared, and the second trial had yet to commence. Compare *United States* v. *Means*, 513 F. 2d 1329 (C.A. 8).

[12] See also *United States* v. *Moon*, 491 F. 2d 1047 (C.A. 5), a pre-*Serfass* case. Moon's first trial ended in a mistrial because of defense counsel's illness. At the second trial the judge granted a mid-trial motion to suppress certain evidence. In light of the surprise to the government, the court granted a mistrial. The district court later dismissed the indictment, concluding that a third trial

3. For the reasons set forth above, we believe that the decision of the court of appeals is not only wrong but in conflict with the applicable decisions of this Court (and with the import of the earlier order of this Court in the case) as well as with the decision of another court of appeals. These reasons suffice to justify review by this Court even though the holding of the court of appeals, narrowly construed, governs a limited class of cases, those in which a mistrial is followed by a ruling of the district court dismissing the indictment prior to the second trial.

Moreover, the court of appeals has in fact acted upon the basis of principles that extend considerably beyond post-mistrial orders dismissing indictments. The court has held that the government cannot appeal whenever, after the appeal, a new trial would be required; this bar applies whether or not the new trial independently would be precluded by the Double Jeopardy Clause. Under the mechanical rule articulated by the court of appeals, the government could not appeal from a post-mistrial order suppressing evidence, even though 18 U.S.C. 3731 authorizes such an appeal and even though the second trial following the appeal would be permissible under the Double Jeopardy Clause.[13]

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would violate the Double Jeopardy Clause. The court of appeals concluded that the mid-trial suppression motion should not have been granted, that the mistrial was appropriate, and that a third trial would not violate the Double Jeopardy Clause. It entertained the government's appeal and remanded for another trial.

[13] The court of appeals conceivably could allow an appeal in such a case by arguing that the granting of a motion to suppress

There is another important class of cases in which the principles of the instant decision would preclude government appeals otherwise authorized by Section 3731—cases in which the first trial resulted in a conviction that has been reversed on appeal and remanded for a new trial, and in which the district court suppresses evidence or dismisses the indictment prior to that second trial. Under the instant decision, government appeal is precluded by the combination of two factors: that there has been a previous trial, and that the government's success on appeal would lead to a second trial. Both conditions are satisfied when a conviction has been reversed and a new trial ordered, and there is no principled basis for distinguishing the government's right to appeal a dismissal of an indictment in such circumstances from the appealability of the instant, post-mistrial dismissal. If the court of appeals were correct in the instant case, the fact that a second trial is constitutionally permissible following reversal of a conviction (*United States* v. *Jorn*, 400 U.S. 470, 484) would no more support the government's appeal rights than does the fact that in the instant case a second trial of respondents was constitutionally permissible following the declaration of a mistrial.

The problems presented by this case will not dissipate over time. The court of appeals has effectively declared the Criminal Appeals Act unconstitutional to

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does not "terminate the prosecution" in a defendant's favor, but simply makes the prosecution unlikely to succeed. But in the light of the court's double jeopardy analysis this would be a distinction without a difference, because in either event a successful appeal by the government would be followed by a second trial.

the extent it authorizes an appeal by the government that, if successful, would be followed by a second trial. There is a conflict among the circuits on the precise question presented here, and the court of appeals has articulated a rule that logically would control many cases in addition to that ones involving that specific question. We therefore believe that the Court should review this case and direct the court of appeals to consider the merits of the government's appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
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Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JUNE 1976.

APPENDIX A

In the United States Court of Appeals for the Ninth Circuit

No. 73-3016

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

NELSON E. "BUCK" SANFORD, RODNEY N. SANFORD, LON S. SANFORD AND RICK SANFORD, DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the District of Montana

[May 27, 1976]

Before: MERRILL, TRASK and SNEED, Circuit Judges.

OPINION

MERRILL, Circuit Judge:

This appeal by the Government from an order dismissing indictment is back before us on remand from the Supreme Court of the United States. When it was before us the first time, 503 F. 2d 291 (9th Cir. 1974), we held that the Government could not appeal dismissal of the indictment against appellees under 18 U.S.C. § 3731,[1] since further prosecution would place

[1] That section authorizes appeal by the Government "from a decision, judgment, or order of a district court dismissing an indictment or information * * * except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

them twice in jeopardy. Writ of certiorari was granted by the United States Supreme Court, resulting in an order vacating our judgment and remanding the cause "for further consideration in the light of *Serfass* v. *United States,* 420 U.S. 377 (1975)." 421 U.S. 996 (1975).

The facts on the basis of which the district court ordered dismissal of the indictment are discussed in our earlier opinion. It suffices here to say that trial of appellees resulted in a hung jury and declaration of mistrial, and that prior to retrial the district court granted appellees' motion to dismiss the indictment. Relying on evidence presented at the trial the court ruled as matter of law that the Government, through its authorized agents, had given its consent to the actions of appellees on which the indictment was based.

In *Serfass* v. *United States, supra,* the indictment, charging refusal to submit to induction into the armed forces, was dismised prior to trial on the ground that the Selective Service file disclosed a prima facie case for relief. The Court, at 387, quoted *Green* v. *United States,* 355 U.S. 184, 187 (1957), to the effect that: "'The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . .'" The Court ruled:

> Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, 'put to trial before the trier of facts.' * * * Petitioner had not waived his right to a jury trial * * *. In such circumstances, the District Court was without power to make any determination regarding petitioner's guilt or innocence. * * * At no time during or following the hearing on petitioner's motion to dismiss the indictment did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach.

420 U.S. at 389. The Court accordingly held that the Double Jeopardy Clause did not bar appeal by the United States under § 3731.

That ruling, however, does not apply to the case now before us. Here appellees have undergone trial. There is no question but that jeopardy has attached. That being so, and since the proceedings in the district court have ended in appellees' favor and the consequences of a reversal in favor of the Government would be that appellees must be tried again, we conclude that they would, on retrial, be placed twice in jeopardy. In this we rely upon two recent decisions of the Supreme Court handed down shortly before *Serfass* and after our earlier decision: *United States* v. *Jenkins,* 420 U.S. 358 (1975), and *United States* v. *Wilson,* 420 U.S. 332 (1975).

In *Wilson,* trial had resulted in a guilty verdict. Defendant had made a pretrial motion to dismiss the indictment upon the ground of delay in bringing him to trial. The motion had been denied. Following trial he had filed various motions, including ones for arrest of judgment and judgment of acquittal. The district court reversed its earlier ruling and dismissed the indictment on the ground that the preindictment delay was unreasonable and had prejudiced the defendant's right to a fair trial. The Supreme Court held appellate review of this determination was not barred since the defendant would not have to undergo a second

trial; reversal on appeal would merely serve to reinstate the guilty verdict. The Court stated: "[W]e agree with the Government that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense * * *" 420 U.S. at 336. Discussing the importance of avoiding this danger, the Court said:

> The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. See *United States* v. *Gilbert*, 25 F. Cas. 1287 (No. 15,204) (CCD Mass. 1834) (Story, J.). It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the Government enjoyed no similar right. *United States* v. *Ball*, 163 U.S. 622.

Id. at 343 (footnote omitted).

In *Jenkins*, a full trial to the court without jury had been had and findings of fact had been made by the court. A question was presented by the fact that the law of the circuit at the time of the offense had, since the offense, been changed by a decision of the Supreme Court. The district court ruled that the Supreme Court decision should not be given retroactive effect and dismissed the indictment under the former circuit rule. The Government appealed, seeking reversal of this ruling. With reference to the Government's position, the Court stated:

> If the court prepares special findings of fact * * * it may be possible upon sifting those findings to determine that the court's finding of 'not guilty' is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard. The Government argues that this is essentially what happened in this case.

420 U.S. at 367. The Court rejected this argument, saying:

> * * * a determination by the Court of Appeals favorable to the Government on the merits of the retroactivity issue tendered to it by the Government would not justify a reversal with instructions to reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate.

Id. at 368.

Further discussing the Government's position, the Court stated:

> The Government suggests two possible theories, each of which would go beyond our holding in *Wilson*, for permitting an appeal even though the trial proceedings did not result in either a verdict or a finding of guilt. First, the Government suggests that 'whether a new trial must follow an appeal is always a relevant consideration,' but no more; the Double Jeopardy Clause is not an absolute bar in such a situation. Second, at least in a bench trial setting, the Government contends that the concept of 'trial' may be viewed quite broadly. If, in a bench trial, a judge has ruled in favor of the defendant at the close of the Government's case on an erroneous legal theory, the Government ought to be able to appeal; if the appeal were successful, any subsequent proceedings including, presumably, the reopening of the proceeding for the admission of additional evidence, would merely be a 'continuation of the first trial.' This theory would also permit remanding a case to the District Court for more explicit findings.

> We are unable to accept the Government's contentions. Both rest upon an aspect of the 'continuing jeopardy' concept that was articulated by Mr. Justice Holmes in his dissenting opinion in *Kepner* v. *United States,* 195 U.S., at 134–137, but has never been adopted by a majority of this Court.

Id. at 368–69 (footnotes omitted).

The Court concluded:

> Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial which could have resulted in a judgment of conviction has long since terminated in respondent's favor. To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause.

Id. at 369–70.

On the basis of this authority we conclude that reversal here would subject appellees to double jeopardy, and that the appeal accordingly must be dismissed under 18 U.S.C. § 3731.

It is of no consequence that retrial on remand here would be necessitated not by alleged judicial intervention and error but by the fact that the jury on the first trial was unable to agree. We recognize that at

that point, following mistrial, retrial would not have constituted double jeopardy, even without consent of appellees, since "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez,* 9 Wheat. 579, 580 (1824). Without retrial the judicial process would be frustrated; the dispute would be at stalemate. Here, however, mistrial was followed by a judicial action terminating the trial in appellees' favor. As the Court noted in *Jenkins*: "' * * * it is of critical importance whether the proceedings in the trial court terminate in a mistrial * * * or in the defendant's favor * * *." 420 U.S. at 365 n. 7.

Appeal dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 73-3016, DC #624
UNITED STATES OF AMERICA, *appellant*

v.

NELSON E. "BUCK" SANFORD, ETC., ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the appeal is dismissed.

Filed and entered: May 27, 1976

APPENDIX C

No. 73–3016

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APELLANT

v.

NELSON E. "BUCK" SANFORD, RODNEY N. SANFORD, LON SANFORD, AND RICK SANFORD, APPELLEES

On Appeal from the District Court, District of Montana

[September 24, 1974]

Opinion

Before: HAMLEY, MERRILL, and SNEED, Circuit Judges.

PER CURIAM: The Government appeals from dismissal of a seven count indictment against Nelson Sanford and his sons, Rodney, Lon and Rick Sanford. We find that this court lacks jurisdiction to hear this appeal and therefore dismiss it.

The indictment alleged the following facts. The Sanfords are engaged in the business of outfitting and guiding big game hunts in Montana. Rodney Sanford telephoned Paul Bagalio at Bagalio's home in Vermont on December 22, 1971. During this conversation, Rodney offered his services as a guide for late season elk and Rocky Mountain bighorn sheep hunting in Montana. A second conversation to the same effect was

held on December 29, at which time the hunts at issue in this case were arranged. Subsequently, Bagalio telephoned Rodney and obtained permission to bring along Bruce Parker, who Bagalio described as "a friend and business associate."

The Sanfords were unaware that both Bagalio and Parker were acting in undercover capacities for the Bureau of Sport Fisheries and Wildlife and were authorized by federal officials to do whatever was necessary to complete their investigations.

Bagalio and Parker arrived in Montana early in January, 1972. On January 6, they were transported by Lon, Rick and Rodney Sanford from Bridger, Montana to Greybull, Wyoming, where they secured lodging for the night. The next morning, the party of five boarded a helicopter and were transported to the Crow Indian Reservation in Montana. At this time, they penetrated the boundaries of the Reservation in search of elk. Parker, at the direction of Rodney Sanford, shot at and knocked down a bull elk; the *coup de grace* was administered by Rodney Sanford. Shortly thereafter, Rick Sanford returned by helicopter and transported the party and the cape of the elk from the Reservation back to Greybull, Wyoming. The cape was then carried by Lon, Rick and Rodney Sanford to Bridger, Montana. Bagalio and Parker apparently joined the Sanfords in Montana on January 10.

A second hunt was planned but first postponed because of inclement weather. The expedition finally got under way on February 2, 1972. At this time, Bagalio, Parker and Rodney Sanford again penetrated the exterior boundaries of the Crow Indian Reservation. At the direction of Rodney Sanford,

Bagalio shot and killed a second elk. Rodney caped the elk, and the party, leaving the carcass behind, left the Reservation.

Within the next few days, Rodney Sanford guided Bagalio and Parker on a hunt for Rocky Mountain bighorn sheep. Rodney led the party into Yellowstone National Park, where he pointed out a sheep for Bagalio to shoot. Bagalio shot and killed the sheep. Rodney removed the cape, head and horns from the sheep, leaving the carcass where it fell.

A seven count indictment was returned against the Sanfords. In Count I, Nelson, Rodney, Lon and Rick were charged under 18 U.S.C. §§ 2, 43, and 371 with conspiracy to transport in interstate commerce animals killed in violation of R.C.M. § 26–307(3) and 16 U.S.C. § 26. Count II charged Lon and Rodney Sanford with the January 8 illegal entry on the Crow Indian Reservation, 18 U.S.C. § 1165, and further charged Nelson and Rick Sanford with aiding and abetting the commission of the offense, 18 U.S.C. § 2. Count III charged Rodney Sanford for a similar offense with respect to the February 2 entry onto the Crow Indian Reservation; Nelson, Rick and Lon Sanford were charged with aiding and abetting this offense. Count IV charged Rodney Sanford with illegal hunting within Yellowstone National Park, 16 U.S.C. § 26. The remaining three counts concerned alleged violations of the Lacey Act, 18 U.S.C. § 43. In Count V, Rodney, Lon and Rick were charged with interstate transportatin of the elk killed on January 8; the elk was said to have been killed in violation of federal, 18 U.S.C. § 1165, and state, R.C.M. § 26–307(3), laws. Count VI made the same charge against Rodney Sanford with respect to the

elk killed on February 2. Finally, Count VII made an identical charge against Nelson Sanford for the transportation of parts of the bodies of the two dead elk from Billings, Montana, to Seattle, Washington; Rodney, Lon and Rick Sanford were charged with aiding and abetting the commission of this offense.

Trial of this case began on February 5, 1973. A mistrial resulted by reason of a hung jury. Prior to retrial the district judge granted the defendants' motion to dismiss the indictment. The Government appeals from the grant of this motion.

Our jurisdiction in this case must be found, if at all, in 18 U.S.C. § 3731, as amended, which grants to the Government the right to appeal the dismissal of an indictment "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

In *United States* v. *Hill*, 473 F. 2d 759, 761 (9th Cir., 1972), this Court quoted with approval the general rule as to when a defendant has been put in jeopardy appearing in *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10th Cir., 1936) which is as follows:

> The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information, has pleaded, and a jury has been impaneled and sworn; and where a case is tried to a court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence.

In *Hill* we then applied this rule to the facts of that case and held that when the defendant had been arraigned on a valid indictment to which he had pleaded and the court had heard evidence going to the general issue whether the defendant was guilty of

the offense charged, a finding by the court that the defendant was not guilty of the offense charged constituted jeopardy and deprived us of jurisdiction to hear the appeal by the Government.

Hill is controlling here. The dismissal of the Sanfords indictment followed a mistrial at which all relevant evidence was heard. In his Opinion and Order of August 31, 1973, the district judge found as a matter of law that the Government, through its authorized agents,[1] had given its consent to the acts of the defendants and that their conduct was not criminal. The Sanfords have been once put in jeopardy and this appeal must therefore be dismissed.

The presence of a mistrial in this case does not distinguish it from *Hill*. Even though a mistrial alone does not constitute jeopardy, the action of the district judge was based upon evidence heard at the trial going to the general issue of guilt and his order dismissing the indictment amounted to a finding of not guilty as a matter of law. As we made clear in *Hill*, existence of jeopardy does not rest on whether the district judge's ruling was correct as a matter of law.

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[1] The Opinion and Order provides the following summary of relevant testimony:

"At the trial, a Government witness, Robert C. Freeman, who was the United States Game Management Agent in charge of the State of Montana, testified that he authorized the shooting of the animals in question. Furthermore, Freeman testified that a similar authorization was made by the appropriate official in the State of Montana Fish and Game Department. When asked if Mr. Parker and Paul Bagalio were authorized to do it '* * * whatever was necessary to complete this investigation * * *,' Freeman responded: 'They were given authority by our Bureau to do what was necessary to complete the investigation, yes.'"

On this we here express no opinion. We merely hold that under the circumstances of this case the defendants have been acquitted of all charges and that we have no jurisdiction to hear the Government's appeal.

Appeal dismissed.

APPENDIX D

[Filed and E ered in Docket, August 31, 1973; John J. Parker, Clerk; By Deputy Clerk]

In the United States District Court for the District of Montana, Billings Division

Criminal No. 624

UNITED STATES OF AMERICA, PLAINTIFF

v.

NELSON E. "BUCK" SANFORD, RODNEY N. SANFORD, LON SANFORD, AND RICK SANFORD, DEFENDANTS

OPINION AND ORDER

This cause came before the court on November 2, 1972, upon the filing of an indictment. That indictment may be summarized as follows:

1. *Count I—Conspiracy.*

Prior to December 22, 1971, the parties willfully and knowingly conspired to transport in interstate commerce parts of illegally killed elk and Rocky Mountain Big Horn sheep, contrary to Title 18 U.S.C. § 371.

2. *Count II—Trespass.*

On January 8, 1972, Lon Sanford and Ron Sanford did willfully and knowingly go upon the Crow Indian Reservation for the purpose of hunting elk, without permission, contrary to Title 18 U.S.C. § 1165. Rick

Sanford and Nelson Sanford aided and abetted, contrary to Title 18 U.S.C. § 2.

3. *Count III—Trespass.*

On February 2, 1972, Rodney Sanford did willfully and knowingly go upon the Crow Indian Reservation for the purpose of hunting elk, without permission contrary to Title 18 U.S.C. § 1165, aided and abetted by Nelson Sanford, contrary to Title 18 U.S.C. § 2.

4. *Count IV—Hunting in Yellowstone Park.*

On February 7, 1972, Rodney Sanford did willfully and knowingly hunt a Big Horn sheep in Yellowstone National Park, contrary to Title 16 U.S.C. § 26.

5. *Count V—Transportation.*

On January 8, 1972, Rodney, Lon and Rick Sanford transported, in interstate commerce, from Lovell, Wyoming, to Bridger, Montana, parts of an elk, illegally killed, contrary to Title 26–307(3), Revised Codes of Montana 1947, and Title 18 U.S.C. § 1165, all in violation of Title 18 U.S.C. § 43.

6. *Count VI—Transportation.*

On February 3, 1972, Rodney Sanford transported in interstate commerce, from Lovell, Wyoming, to Bridger, Montana, parts of an elk, illegally killed, contrary to Title 26–307(3), R.C.M. 1947, and Title 18 U.S.C. § 1165, all in violation of Title 18 U.S.C. § 43.

7. *Count VII—Transportation*

On February 16, 1972, Nelson E. Sanford transported in interstate commerce from Billings, Montana, to Seattle, Washington, parts of two elk, illegally killed, contrary to Title 26–307(3), R.C.M. 1947, and Title 18 U.S.C. § 1165, all in violation of 18 U.S.C.

§ 43. Rodney, Ron and Rick Sanford aided and abetted contrary to Title 18 U.S.C. § 2.

The indictment alleged that defendant Rodney Sanford telephoned one Paul A. Bagalio and offered his services as a guide for a late season elk and Rocky Mountain Big Horn sheep hunt. Eventually, the indictment alleges, Bagalio participated in the hunt with one Bruce A. Parker, an agent of the Bureau of Sport Fisheries and Wildlife. While under the guidance of some of the defendants Sanford, two elk were downed on the Crow Indian Reservation—one by Agent Parker and the other by Paul Bagalio. Also while under the guidance of some of the defendants Sanford, Paul Bagalio killed a Rocky Mountain Big Horn sheep within the exterior boundaries of Yellowstone National Park.

In addition to the defendants Sanford, the indictment charged Chris Klineburger, Bert Klineburger, Gene Klineburger, and Jonas Brothers of Seattle, Inc., with illegal conduct as specified in particular counts of the indictment.

The trial of this cause began on February 5, 1973. After the impanelment of a jury, evidence was introduced by and on behalf of the plaintiff. Subsequently, counsel for the defendants Klineburger and Jonas Brothers of Seattle, Inc., moved for judgment of acquittal on the ground that the Government had failed to prove their participation in the offense. This court found the motion to be meritorious and entered a judgment of acquittal as to the defendants Klineburger and Jonas Brothers of Seattle, Inc. As to the defendants Sanford, a mistrial resulted by reason of a hung jury.

Subsequently, the defendants Sanford, advancing several grounds, have moved to dismiss the indictment against them.[1]

I

CONSENT

Defendants argue that the consent of the Federal Government to the killing of the animals in question deprives the acts alleged of any illegality. The indictment alleges that all of the animals involved in this cause were downed by either Agent Parker of the Bureau of Sport Fisheries and Wildlife, or Paul Bagalio, who was specially deputized. At the trial, a Government witness, Robert C. Freeman, who was the United States Game Management Agent in charge of the State of Montana, testified that he authorized the shooting of the animals in question. Furthermore, Freeman testified that a similar authorization was made by the appropriate official in the State of Montana Fish and Game Department. When asked if Mr. Parker and Paul Bagalio were authorized to do "* * * whatever was necessary to complete this investigation * * *," Freeman responded: "They were given authority by our Bureau to do what was necessary to complete the investigation, yes."

[1] The defendants have raised an entrapment-like defense, in that the conduct of the Government displays substantial involvement in criminal activity and that the Government's conduct is a violation of the fundamental fairness doctrine. This defense was first presented in the trial by a motion of the defendants to dismiss. The court denied that motion. The defendants again present the same argument in this motion to dismiss. Since the court by this order is granting the defendants' motion to dismiss on other grounds, the court finds it unnecessary to address itself to this argument.

Also, in a memorandum of law in opposition to a motion of defendants Sanford to dismiss, the Government conceded that "Both of these individuals [Agent Parker and Paul Bagalio] were acting in undercover capacities during the entire investigation."

This element of consent goes to the trespasses, alleged in Counts II and III of the indictment in violation of 18 U.S.C. § 1165, and to the hunting in Yellowstone National Park, alleged in Count IV of the indictment in violation of 16 U.S.C. § 26.

In respect to the trespasses, the defendants point to an 1868 Treaty with the Crow Indians. That treaty specifies the Reservation boundaries which cannot be violated by any person "* * * except such officers, agents, and employees of the Government as may be authorized to enter upon Indian Reservations in discharge of duties enjoined by law * * *."

Title 25 U.S.C. § 2 states:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

In the construction of this statute, it is clear that the Secretary of the Interior has overall direction of the management of all Indian affairs and of all matters arising out of Indian relations. This grant of authority can only be construed as vesting in the United States Government, acting through the Department of the Interior, and subordinates, the management and control of all Indian affairs.

In addition, it should be noted that the rules and regulations of the Bureau of Indian Affairs, promul-

gated under the authority of law, have the force and effect of statutes, of which the court will take judicial notice. *Bridgeman* v. *United States,* 140 F. 577 (9th Cir. 1905). One of these regulations, 25 CFR § 1.2 reads:

> The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interests of the Indians.

The language that is appropriate to this case is simply that the regulations are of general application, and that the Secretary of the Interior may waive these regulations if it is in the best interests of the Indians.[2]

The Government is proceeding against the defendants under the authority of Title 18 U.S.C. § 1165 [3]

[2] It is well to note that the Bureau of Indian Affairs is part of the Department of the Interior and under the control of the Secretary of the Interior. The Bureau of Sport Fisheries and Wildlife is also established under the Department of the Interior and comes within the jurisdiction of the Secretary of the Interior.

[3] Title 18 U.S.C.A. § 1165 reads as follows:

"*Hunting, trapping, or fishing on Indian land*

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belonds to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

which incorporates the following language: "Whoever without lawful authority or permission * * * goes upon Indian lands * * *." When authorized representatives of the Department of the Interior enter upon trust lands held for the Crow Indian Tribe, such act so authorized cannot be in violation of the law. The almost absolute power and authority of the Federal Government, and particularly the Department of the Interior, of which the Bureau of Sport Fisheries and Wildlife is a part, to control activities upon Indian lands can scarcely be questioned. This is consistent with the Treaties which granted authority to enter and with regulations duly enacted under the power granted to control all matters arising out of Indian relations under the law. Clearly, Agent Parker and Paul Bagalio had lawful "permission" to go upon the Indian lands in question. Such consent to trespass vitiates the act of any illegality.

Just as there existed authority for Agent Parker and Paul Bagalio to enter upon the Indian land, as demonstrated by the indictment and by testimony of the Government's own witness at the trial, it is equally true that Agent Parker and Paul Bagalio had the consent of the Government to kill the animals in question; and, as the indictment alleges, it was Agent Parker and Paul Bagalio, not the defendants, who downed the animals. Yet, the Govern-

ment is charging the defendants with the violation of Title 18 U.S.C. § 43. That statute states in part:

> Whoever delivers, carries, transports, ships * * * to or from any state * * * any wild mammal or bird of any kind, or the dead body or part thereof, * * * which was captured, killed, taken, purchased, sold or otherwise possessed or transported in any manner contrary to any Act of Congress or regulation issued pursuant thereto or contrary to the laws or regulations of any state * * * shall be fined * * *.:

The Government alleges, in Counts V, VI and VII, that the animals were killed in violation of Title 18 U.S.C. § 1165 and Title 26–307(3), R.C.M. 1947. This court has already held that the trespass statute (18 U.S.C. § 1165) was not violated because the consent to the trespass by the United States Government officials vitiated any criminality under the statute. So, too, does the consent by the State of Montana, as testified to by the Government's own witness, *supra,* vitiate any violation of the state statute, *i.e.,* Title 26–307(3), R.C.M. 1947. Thus, since there was no killing in violation of an Act of Congress as a state law, there can be no illegal transportation of an animal killed in violation of the law.[4]

The defense of consent also vitiates the charges found in Count IV of the indictment. The defendant Rodney Sanford is charged with hunting a Big Horn

[4] The Government cites *United States* v. *Gould*, 419 F. 2d 825 (1969), in opposition to the court's conclusion. In that case, a Government agent and the defendant purchased a quantity of marihuana in Mexico. The agent and the defendant returned to the United States in separate motor vehicles. The marihuana was in

sheep in Yellowstone National Park, contrary to Title 16 U.S.C. § 26.[5] Title 16 U.S.C. § 22 states in part:

> The Yellowstone National Park shall be under the exclusive control of the Secretary of the Interior.

Again, this court has held that the killing was authorized by officials within the Department of the Interior, under the jurisdiction of the Secretary who also has exclusive control of Yellowstone National Park. The Rocky Mountain Big Horn sheep was killed by Paul Bagalio, an undercover agent ultimately under the jurisdiction of the Department of the Interior. It simply follows that the consent vitiates any charge of criminality in this matter.

II

AIDERS AND ABETTORS

The court has previously summarized the indictment in which some or all of the defendants were charged with aiding and abetting criminal activity—i.e., a

the agent's vehicle and the customs officials, with full knowledge of the transaction, allowed the agent and the marihuana to enter the United States. The Court of Appeals for the Ninth Circuit affirmed the defendant's conviction on both counts of (1) knowingly smuggling and clandestinely introducing marihuana into the United States, and (2) knowingly concealing and facilitating the transportation and concealment of marihuana in violation of 21 U.S.C. § 176(a).

The distinction between the *Gould* case and the case at bar is readily apparent. The Sanfords were not charged with the transportation of contraband marihuana. Rather, the Sanfords were charged with the transportation of the parts of illegally killed animals. Elk are not contraband. Here, there were no illegally killed animals.

[5] Title 16 U.S.C. § 26 states in part: "All hunting, or the killing, * * * of any bird or wild animal * * * is prohibited within the limits of said park * * *."

violation of 18 U.S.C. § 1165 (Trespass) and 18 U.S.C. § 43 (Interstate Transportation). These charges appear in Counts II, III and VII of the indictment. Title 18 U.S.C. § 2 states:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

It follows from this statute that one may be charged with aiding and abetting when the principal's guilt has been proven beyond a reasonable doubt or when there is evidence beyond a reasonable doubt that an offense has been committed by a principal.

> Evidence showing an offense to have been committed by a principal is necessary, although it is not required that the principal be convicted, or even that the identity of the principal be established.
>
> *United States* v. *Merriweather*, 329, F. Supp. 1156 (A (S.D. Ala. 1971), at 1160.

In the case at bar, this court has held that authorization by the Government has vitiated the conduct of any criminality. Thus, where there is no criminal conduct by the principals, there can be no culpable parties aiding and abetting those principals in that conduct.

III

CONSPIRACY

Title 18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States,

> or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

This court has held that the conduct alleged to have been completed by the defendants is not criminal. While men may conspire to perform certain conduct, if that conduct when complete does not constitute an offense against the United States or does not defraud the United States, those men cannot be found to constitute part of a criminal conspiracy, as defined by Title 18 U.S.C. § 371. Such is the case here.

For the foregoing reasons, IT IS HEREBY ORDERED that the indictment against the defendants be dismissed.

Done and dated this 31st day of August, 1973.[6]

JAMES F. BATTIN,
United States District Judge.

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[6] It is the intention of the court that the filing date of this order shall be the date of the entry of judgment in this case for the purpose of appeal.

U.S. GOVERNMENT PRINTING OFFICE: 1976

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1867

UNITED STATES OF AMERICA, *Petitioner*

v.

NELSON E. "BUCK" SANFORD, ET AL, Respondents

BRIEF OF RESPONDENTS REQUESTING DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

The United States has petitioned for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case. Respondents request that certiorari be denied.

JURISDICTION

The petition invokes jurisdiction under *28 U.S.C. 1254 (1)*. Respondents contend that the petition does not state special and important reasons therefor as called for in the Supreme Court Rules, Part V, Jurisdiction On Writ of Certiorari, Rule 19, considerations governing review on certiorari. The petition does not specifically prove that this "court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter", or that the circuit court "has decided an important question in a way in conflict with applicable decisions of this court" as required by *Rule 19, 1 (b)*.

QUESTION PRESENTED

Respondents are dissatisfied with the Question Presented as stated in the petition and prefer the language used in the Circuit Court decision and as follows:

> Is the government precluded from appealing because double jeopardy prohibits further prosecution where a mistrial, caused by a hung jury, was followed by judicial action terminating the trial in respondents' favor based on evidence heard during the trial?

STATEMENT OF THE CASE

Respondents do not disagree with the petitioner's Statement set forth there on pages 2 through 9, except to point out that on remand and during oral argument before the Court of Appeals, respondents did contend that the appeal should be dismissed because of the double jeopardy prohibition.

WHY CERTIORARI SHOULD BE DENIED

Respondents contend that certiorari should be denied because (1) *Serfass, Wilson* and *Jenkins*[1] have established the law that applies to this case and a further review thereon by the Supreme Court is necessary, (2) the circuit court's decision was correct in view of *Serfass, Wilson* and *Jenkins* and was not in conflict therewith, and (3) there are no conflicting decisions from another court of appeals on this same matter.

SERFASS, WILSON AND JENKINS

Serfass supports this circuit court decision. There, an indictment was dismissed prior to trial and before a jury was em-

[1] *Serfass v. United States*, 420 U.S. 377, *United States v. Jenkins*, 420 U.W 358, and *United States v. Wilson*, 420 U.S. 332.

panelled and sworn. Jeopardy never attached and so the government properly had the right to appeal.

In this *Sanford* case, a jury was empanelled and sworn, at which time jeopardy attached. Following a hung jury and a declaration of a mistrial, the district court then granted a motion to dismiss based on evidence heard during the trial, which terminated this case in respondents' favor.

The government argues correctly that a retrial after a mistrial caused by a hung jury is not barred by double jeopardy, but this is not our case, and this is not *Serfass*. *Serfass* held at *43 L.Ed.2d at page 274:*

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy'. See United States v. Jorn, 400 U.S. at 480. In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. Downum v. United States, 372 U.S. 734 (1963); Illinois v. Somerville, 410 U.S. 458 (1973). In a non-jury trial, jeopardy attaches when the court begins to hear evidence. McCarthy v. Zerbst, 85 F.2d 640, 642 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.' United States v. Jorn, 400 U.S., at 479. See Kenner v. United States, 195 U.S. 100, 128, 130-131 (1904); United States v. McDonald, 207 U.S. 120, 127 (1907); Bassing v. Cady, 208 U.S. 386, 391-392 (1908); Collins v. Loisel, 262 U.S. 426, 429 (1923).

> "Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, 'put to trial before the trier of facts."

The respondent Sanfords have been "put to trial before the trier of facts."

The government wants to have the best of two worlds by claiming that the mistrial wiped the slate clean and somehow operated to remove jeopardy which had there clearly attached under *Serfass*. A retrial after a mistrial caused by a hung jury is permitted by law as one of the established exceptions to the double jeopardy bar to further prosecution. This principle has been followed ever since it was first established in *United States v. Perez*, 9 Wheat. 479. As this rule applies to this case, if the trial court had not terminated it in respondents' favor, then there could have been no possible objection to a retrial. In that situation the only previous decision would have been the mistrial, caused by the hung jury, clearly not a decision either in favor of the government or in favor of the respondents. There, even though jeopardy had attached during the first trial, a retrial would be permitted.

However, here the trial court terminated this case in respondents' favor, based on evidence heard during the jury trial and after jeopardy had attached. Just as double jeopardy bars a government appeal from a jury verdict of not guilty, so does double jeopardy bar this appeal.

In *Serfass* there was no termination in favor of the defendant after jeopardy had attached, and here there was a termination in favor of respondents after jeopardy had attached.

Wilson establishes the law that double jeopardy will not bar a government appeal where no ruling thereon could subject the defendant to a second trial. There, by postverdict motion after a guilty verdict, the indictment was dismissed. So on appeal *Wilson* could prevail, the matter would be final and there would be no second trial, or the government could prevail, and there still would be no second trial, as the case would then revert to the guilty verdict. *Wilson* said that "Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution".

Contrast *Wilson* with respondents' position where a reversal on appeal would subject them to a second trial.

In *Jenkins*, the Court held that ". . . it is of critical importance whether the proceedings in the trial court terminate in a mistrial . . . or in the defendant's favor . . . " 420 U.S. at 365 n. 7 and as cited in the Circuit Court decision in this case. In *Jenkins*, the District Court dismissed the indictment and discharged him following a bench trial. Jeopardy had attached. A successful appeal by the government would require a second trial. In holding that double jeopardy barred the government's appeal, this Court held at *43 L.Ed.2d at page 250:*

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore the determination of appealability under 18 USC 3731 (18 USCS 3731), that further proceedings of some sort, devoted to the resolution of factual issues going to the

> elements of the offense charged, would have been required upon reversal and remand."

Respondents respectfully contend that *Serfass* establishes that the government can appeal until the time that jeopardy attaches, and *Wilson* and *Jenkins* establish that even after jeopardy attaches, the government can appeal if a reversal on appeal will not subject the defendant to a second trial, and that there is a critical difference between a mistrial caused by a hung jury and a termination of a case in favor of the defendant after jeopardy has attached. The Circuit Court correctly applied this law to respondents' case. There is no need for further consideration by the Supreme Court. The government should now be able to understand these limits on its expanded rights to appeal.

CONFLICTING CIRCUIT COURT DECISIONS

In paragraph 2, at page 14, of the petition, the government cites *United States v. Wilson,* No. 75-1944, decided April 22, 1976 as a conflicting decision from the Sixth Circuit and respondents respectfully differ. There, the question of jurisdiction to entertain the appeal was not discussed. The question there was whether double jeopardy barred a second trial and the Sixth Circuit correctly held that the district court's decision thereon was erroneous. This same law would apply to respondents' case.

The real problem appears to be in trying to set out what the problem is. The government petition starts out by incorrectly stating the question involved and then by arguing that the circuit court decision bars the government from appealing any

pretrial orders of a second trial which follows a mistrial caused by a hung jury. These are not the facts or the law.

In this case, the Circuit Court has held only that following a mistrial caused by a hung jury and where the District Court has then granted respondents' motion to dismiss the indictment, based on evidence heard during their first trial, which terminated the case in their favor, that (1) jeopardy attached, (2) there was a termination in respondents' favor, (3) a reversal on appeal would subject respondents to a second trial, and (4) this constitutes double jeopardy which bars the government's right to appeal.

As noted in *Jenkins* at *43 L.Ed.2d at page 250:*

> "The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause:
>
> > "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .' Green, supra, at 187, 2 L Ed 2d 199."

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

CHARLES F. MOSES
Attorney for Respondents.

July 1976

CERTIFICATE OF SERVICE

I certify that I served this Brief of Respondents Requesting Denial of the Petition for Writ of Certiorari on:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

UNITED STATES ATTORNEY
Federal Building
Billings, Montana 59101

by depositing two copies each respectively to them in the United States Post Office, Billings, Montana, on July 23rd 1976, first class postage prepaid, at such addresses.

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Charles F. Moses

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